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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

Cung Le, Nathan Quarry, Jon Fitch, Brandon  
Vera, Luis Javier Vazquez, and Kyle Kingsbury,  
on behalf of themselves and all others similarly  
situated,

Plaintiffs,

v.

Zuffa, LLC, d/b/a Ultimate Fighting  
Championship and UFC,

Defendant.

Case No.: 2:15-cv-01045-RFB-(PAL)

**PLAINTIFFS' BRIEF IN OPPOSITION TO  
DEFENDANT ZUFFA, LLC'S MOTION TO  
EXCLUDE THE TESTIMONY OF GUY A.  
DAVIS (ECF NO. 517)**

**HEARING REQUESTED**

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## GLOSSARY OF ABBREVIATIONS

For the convenience of the Court and efficiency, Plaintiffs' Brief in Opposition to Zuffa, LLC's Motion to Exclude the Testimony of Guy A. Davis (ECF No. 517) uses the following abbreviations:

Declaration of Eric L. Cramer, Esq. (April 6, 2018)	CD2	Filed with the Singer/Zimbalist Daubert Opp.
Expert Report of Guy Davis, CPA, CIRA, CDBV, CFE (August 31, 2017)	GDR1	ECF No. 518-8
Rebuttal Expert Report of Guy Davis, CPA, CIRA, CDBV, CRE (January 12, 2018)	GDR2	ECF No. 518-9
Expert Report of Elizabeth Kroger Davis, (October 27, 2017)	EDR1	ECF No. 517-7
Expert Rebuttal Report of Andrew Zimbalist (December 26, 2017)	ZR2	ECF No. 518-6
Rebuttal Expert Report of Hal J. Singer, Ph.D. (January 12, 2018)	SR2	ECF No. 518-4
Zuffa, LLC's Motion to Exclude the Testimony of Plaintiffs' Expert Guy A. Davis, ECF. No. 517 (February 16, 2018)	DD	ECF No. 517

## I. INTRODUCTION

Zuffa moves to exclude the testimony of Plaintiffs' accounting expert, Mr. Guy Davis, that Zuffa [REDACTED]. See GDR1 at 18 (Opinion 5); GDR2, *passim*. Zuffa also moves to exclude Mr. Davis's rebuttal report as beyond the scope of proper rebuttal. Zuffa does not seek to exclude the remainder of Mr. Davis's opinions. See GDR1 at 16-18 (Opinions 1-4, 6).

Zuffa seeks to present testimony from its accountant, Ms. Elizabeth Kroger Davis, that Zuffa could not afford to pay Fighters the amounts claimed by Plaintiffs as damages. Zuffa nonetheless seeks to prevent Plaintiffs from countering this evidence through Mr. Davis's testimony that by forgoing some of the [REDACTED] in distributions to its three original shareholders (and the debt burdens that facilitated those distributions), along with excessive spending on private jets and management fees (paid to its owners), Zuffa could have afforded to pay its fighters [REDACTED] more—before taking into account the increased output and additional sources of compensation that Plaintiffs' economists opine would have existed absent Zuffa's anti-competitive Scheme. See, e.g., SR2 ¶¶ 200-09; *see infra* n.8.

Zuffa's motion should be denied, because: (1) Zuffa has put at issue its capacity to pay Fighters more during the Class Period; (2) Mr. Davis's opinions require expertise beyond that of the ordinary lay juror; (3) Mr. Davis's methodology is sound and reliable; and (4) Mr. Davis's rebuttal is proper under Fed. R. Civ. P. 26(a)(2)(D)(ii) (and even if it were not proper rebuttal, Ms. Davis's surrebuttal report gave Zuffa the last word and eliminated any possible prejudice).

## II. STATEMENT OF FACTS

Guy Davis is a Certified Public Accountant, a Certified Insolvency and Restructuring Advisor, a Certified Fraud Examiner, and holds a Certification in Distressed Business Valuation. He is also a fellow of the American College of Bankruptcy. For twenty-eight years, he has performed a variety of forensic accounting and financial consulting services. He has also served as a financial consultant and/or expert witness in federal and state courts on behalf of governmental agencies, corporations, partnerships,

1 individuals, class action plaintiffs, sureties, and financial institutions. GDR1 at 5-6. Zuffa does not  
 2 challenge his qualifications, and his testimony has never been excluded by any court.<sup>1</sup>

3 In his initial report, Mr. Davis expressed six opinions, including that [REDACTED]  
 4 [REDACTED] (GDR1 at 18 (Opinion 5)). In her  
 5 initial report, Zuffa's accountant opined, among other things, that:

6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]

13 In his Rebuttal Report, Mr. Davis opined:

14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]

17 Zuffa submitted a Surrebuttal Report from Ms. Davis in response to Mr. Davis's rebuttal.  
 18

19 <sup>1</sup> See, e.g., *MF Global Holdings Ltd. v. PricewaterhouseCoopers LLP*, 232 F. Supp. 3d 558, 577-78  
 20 (S.D.N.Y. 2017); *Va. Elec. & Power Co. v. Bransen Energy, Inc.*, No. 3:14-cv-538, 2016 WL 590464, at  
 21 \*3 (E.D. Va. Feb. 11, 2016); *In re Payless Cashways, Inc.*, 290 B.R. 689, 702 (Bankr. W.D. Mo. 2003);  
 22 *In re Nelco, Ltd.*, 264 B.R. 790, 801 (Bankr. E.D. Va. 1999); *Silverman Consulting, Inc. v. American*  
 23 *Water Heater Co.*, Nos. 02-04055, 02-04139, 02-04134, 02-4078 (Bankr. W.D. Mo., filed Mar. 14, 2002,  
 24 July 19, 2002, July 19, 2002, Apr. 26, 2002); *Official Cmte. of Unsecured Creditors v. Home Depot*  
 25 *U.S.A., Inc.*, No. 12-01475 (Bankr. E.D. Va., filed Oct. 18, 2012); *Storehouse, Inc., Debtor*, No. 06-11144  
 26 (Bankr. E.D. Va., filed Sept. 18, 2006); *Teitz v. Va. Elec. & Power Co.*, No. 08-00041 (Bankr. N.D. W.  
 27 Va., filed May 5, 2008); *In re The Rowe Cos., et al.*, No. 06-11142 (Bankr. E.D. Va., filed Sept. 18, 2006);  
 28 *Heilig-Meyers Co.*, No. 00-34533 (Bankr. E.D. Va., filed Aug. 16, 2000); *In re Fas Mart Convenience*  
*Stores, Inc.*, No. 01-60386 (Bankr. E.D. Va., filed Mar. 9, 2001); *Estate of Amerihube, Inc. v. Gilliam*, No.  
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*Kurt Miller Wassenaar*, No. 99-01042 (Bankr. W.D. Va., Apr. 7, 1999).



1 In its *Daubert* motion, Zuffa seeks to exclude Guy Davis's opinion regarding Zuffa's capacity to  
 2 have paid its Fighters substantially more, on the grounds that this testimony is purportedly irrelevant,  
 3 within the understanding of the average lay person, unreliable, and, as to Mr. Davis's rebuttal report,  
 4 beyond the scope of proper rebuttal testimony.<sup>2</sup>

### 5 **III. LEGAL STANDARD**

6 The legal standards for admissibility of expert testimony are set forth in the separate *Daubert*  
 7 opposition brief concerning Plaintiffs' experts Drs. Singer and Zimbalist filed simultaneously herewith.

### 8 **IV. ARGUMENT**

#### 9 **A. Zuffa Put At Issue Its Capacity To Pay Fighters More**

10 Zuffa argues that its capacity to increase its Fighters' compensation in the but-for world (absent  
 11 the challenged conduct) is legally irrelevant. DD at 7-8. Plaintiffs agree. *See In re Se. Milk Antitrust*  
 12 *Litig.*, 2011 WL 13122688, at \*2 (E.D. Tenn. July 15, 2011) (evidence of defendant's financial condition  
 13 and ability to pay irrelevant). Moreover, even if that analysis were required, looking solely to whether  
 14 Zuffa alone could have paid substantially more based on its actual revenues—as Guy Davis has done—  
 15 is highly conservative. What matters is what the industry-wide revenues would have been in the but-for  
 16 world. As Dr. Singer made clear, “the appropriate analysis looks to the available revenues earned by  
 17 Zuffa and other MMA promoters in the but-for world.” SR2 ¶ 200; *see also infra* n.8. Dr. Topel  
 18 acknowledged this as well. *See* CD2, Ex. 57 (Topel Dep. 2) at 422:22-423:18, 425:9-426:3. The higher  
 19 competitive pay levels would likely have come not solely from Zuffa, but also from other MMA  
 20 promotions that would have been better able to compete. SR2 ¶ 197 (“In the but-for world, other MMA  
 21 promoters would be able to compete effectively with Zuffa for Fighter services, because they would not  
 22 be foreclosed from a critical input.”).<sup>3</sup>

23  
 24 <sup>2</sup> Zuffa does not seek exclusion of Opinions 1-4 and 6 in Mr. Davis's initial report, which [REDACTED]

25 [REDACTED] GDR1 at 16-18.

26 <sup>3</sup> Further, while Mr. Davis conservatively engages in a static analysis—assuming the same total MMA  
 27 revenues as in the actual world—Plaintiffs' economists make clear [REDACTED]

28 [REDACTED] *See, e.g.*, SR2 ¶¶ 202-08 ([REDACTED])

[REDACTED]; *id.* ¶ 202 (“[REDACTED]”)



1 Zuffa, however, placed its finances squarely at issue by presenting expert testimony from  
 2 Elizabeth Davis that [REDACTED]  
 3 [REDACTED]. EDR1 at 10-11 (Opinions 3 & 4), 23-29. Where a party puts its  
 4 finances at issue, its adversaries are entitled to put on their own evidence regarding that party's finances.  
 5 *See, e.g., Oracle USA, Inc. v. Rimini Street, Inc.*, 2015 WL 5165374, at \*\*2-3, (D. Nev. Sept. 3, 2015)  
 6 ("Oracle's overall company wealth and financial assets are relevant as Oracle has put its wealth and  
 7 financial condition directly at issue in this case."). Having put at issue its capacity to pay, Zuffa should  
 8 not be permitted to prevent Plaintiffs from responding.<sup>4</sup>

9 **B. Mr. Davis's Opinions Require Specific Expertise**

10 Zuffa argues that "Mr. Davis's testimony also should be excluded because it requires no special  
 11 competence to opine that Zuffa could have paid athletes more." DD at 8. This is pure sophistry. While it  
 12 is true that lay jurors could readily conclude that an enormously profitable company like Zuffa—which  
 13 sold in 2016 for \$4 billion—could have remained profitable while paying Fighters more, lay jurors have  
 14 no way of determining, absent expert testimony, how much more. Indeed, in determining Zuffa's capacity  
 15 to increase Fighter pay, Mr. Davis analyzed Zuffa's shareholder dividends and related debt, excess  
 16 aviation fees, management fees, debt service charges, tax obligations, capital requirements, and debt  
 17 covenants, *see* GDR2 at 13-19—all of which fall outside the ability of the average lay person.<sup>5</sup>

18 [REDACTED]  
 19 [REDACTED].").

20 <sup>4</sup> If, however, the Court is inclined to exclude as legally irrelevant Guy Davis's testimony regarding  
 21 Zuffa's capacity to pay its fighters more, it should likewise bar any effort by Zuffa to cry poverty,  
 22 including Elizabeth Davis's testimony on that subject.

23 <sup>5</sup> The cases Zuffa cites are inapposite. In *OPS 2, LLC v. County of Clark*, 2012 WL 424856 (D. Nev. Feb.  
 24 9, 2012), the court held expert testimony that interpreted contract language was inadmissible because  
 25 "interpretation of the plain language of a contract is a matter of law, not fact, and therefore is inappropriate  
 26 for expert testimony," *id.* at \*4, and because expert testimony regarding whether a disputed contract  
 27 materially deviated from the invitation to bid was "conclusory" and "not accompanied by any analysis."  
 28 *Id.* at \*5. Similarly, in *United States v. Frazier*, 387 F.3d 1244 (11th Cir. 2004), the excluded expert  
 provided no methodological basis for his opinion and "never explained just how his own experience, or  
 the texts he mentioned, supported his . . . opinion." *Id.* at 1265. Here, conversely, Mr. Davis's testimony  
 is factual and rests on extensive analysis that Mr. Davis explains in detail. *See* GDR2 at 13-22 (analyzing  
 Zuffa's capacity to pay fighters more while remaining profitable).

**C. Mr. Davis’s Methodology Is Reliable**

**1. Zuffa Misconstrues Mr. Davis’s Testimony About the But-For World.**

Taking snippets of Mr. Davis’s testimony out of context, Zuffa argues that his opinions regarding increased athlete compensation are unreliable because he fails to consider the “but-for” world that would have existed absent Zuffa’s challenged conduct.<sup>6</sup> DD at 9-10. Zuffa contends that Mr. Davis testified that “‘in any hypothetical’ that involves ‘paying fighters more money,’ it is important to consider ‘what the economists have said about the impact of paying fighters more.’” DD at 9 (citing DD, Ex. 2 (G. Davis Dep. 1) at 149:11-20). In context, including the testimony elided by Zuffa, Mr. Davis *actually* testified:

Q. And how does a thousand dollars paid . . . in fighter compensation affect Zuffa’s enterprise value?

A. Well, again, when you deal with paying fighters more money, in any hypothetical, I’m only cautious because of what the economists have said about the impact of paying fighters more. At the thousand-dollar level, it probably wouldn’t have the effect that the economists are contemplating. But they do say that the industry would be larger and there would be competitors.

DD, Ex. 2 (G. Davis Dep. 1) at 149:8-20. In this testimony, Mr. Davis is *not* stating that expert accounting testimony regarding the effect of additional fighter compensation on Zuffa’s balance sheets is unreliable. Instead, Mr. Davis is simply pointing out—accurately—that Drs. Singer and Zimbalist have opined that absent Zuffa’s anti-competitive conduct, there would have been more competitors and greater output in the market for Live MMA Events.<sup>7</sup> As pointed out above, by focusing only on the amount of cash Zuffa alone would have had available to pay Fighters, he is being conservative. In a more competitive but-for world, Fighters would have had the option to be free agents and fight for the highest bidders, and in that world, there would have been more viable promoters and more Live MMA Events. *See, e.g.*, SR2 ¶¶ 202-

<sup>6</sup> Like Zuffa’s relevance argument, Zuffa’s reliability argument, by its own terms, is limited to Mr. Davis’s testimony “involving increased athlete compensation.” DD at 9.

<sup>7</sup> The same is true of the other testimony Zuffa cites. *See* DD, Ex. 2 (G. Davis Dep. 1) at 137:22-138:5 (in but-for world, “the MMA industry would have larger output”); *id.* at 142:20-143:4 (in the but-for world “based on what the economists are saying . . . the industry as a whole would have a greater output and there would be more competitors”); *id.* at 142:2-5 (“you’ve introduced this but-for world wherein the MMA industry is larger, it has a higher output and there are more competitors”).

08; ZR2 ¶80.

In her initial report, Ms. Davis opined [REDACTED] EDR1 at 10-11, 23-29, 50-55 (Opinions 3 & 4). In doing so, Ms. Davis did not consider the expanded market or additional competitors that Drs. Zimbalist and Singer opined would have existed absent Zuffa's challenged conduct. *See* CD2, Ex. 54 (E. Davis Dep.) at 95:2-19, 100:2-101:24, 102:4-103:7.

In response to Ms. Davis's testimony regarding Zuffa's capacity to increase Fighter pay, Mr. Davis, in his rebuttal, demonstrated that even absent the increased output and competition that Drs. Zimbalist and Singer opined would have resulted from elimination of the challenged conduct, [REDACTED] GDR2 at 10-11. While not including any increased output or competition may have rendered Mr. Davis's analysis *conservative*, it did not render his analysis unreliable.<sup>8</sup>

**2. Mr. Davis's Methodology Is Sound, And Is Neither Outcome-Oriented Nor Distorted By Hindsight Bias.**

From 2005 to 2015, [REDACTED] GDR2 at 13. During this period, Zuffa [REDACTED] *Id.* at 16. By forgoing this excessive spending,<sup>9</sup> Zuffa had the capacity to

<sup>8</sup> The cases Zuffa cites, DD at 9-10, which hold that an expert must satisfy his or her own standards of reliability, are unavailing. Mr. Davis did *not* testify that an analysis of Zuffa's financial capacity would be "unreliable" if it did not consider the increased output and competition that would have existed absent Zuffa's anti-competitive conduct. He merely testified—accurately—that Drs. Zimbalist and Singer had opined that elimination of Zuffa's challenged conduct would have resulted in greater output and more competition. Moreover, if Guy Davis's testimony were to be excluded for failure to consider increased output and competition in the but-for world, then Elizabeth Davis's testimony would need to be excluded on that same basis. *See* CD2, Ex. 54 (E. Davis Dep.) at 95:2-19, 100:2-101:24, 102:4-103:7.

<sup>9</sup> [REDACTED] GDR1 at 26. *Id.* at 27.

1 pay its fighters substantially more. *Id.* at 32.

2 Mr. Davis determined Zuffa’s capacity to increase fighter compensation “  
3 [REDACTED]” *Id.* at 18. To determine how much  
4 more Zuffa could have paid its fighters, Mr. Davis followed a rigorous, five-step process that involved  
5 developing a comprehensive financial model, constructing an amortization schedule, creating *pro forma*  
6 financial statements, identifying a range of feasible compensation scenarios, and calculating pro forma  
7 rates of return for equity holders. GDR2 at 13-14. Mr. Davis concluded that [REDACTED]  
8 [REDACTED]—*i.e.*, [REDACTED]  
9 [REDACTED]—“[REDACTED]  
10 [REDACTED]” during the Class Period, while remaining  
11 “[REDACTED].” *Id.* at 22.

12 The analysis in Mr. Davis’s rebuttal was rigorous and consistent with accepted accounting  
13 principles. He posited reasonable dividend and expense policies and consistently applied them every year  
14 to Zuffa’s *pro forma* financial statements. The mere fact that Zuffa does not like the results of these  
15 analyses does not suggest that they are infected with “hindsight bias.” By definition, any backward-  
16 looking analysis is performed with the benefit of hindsight, but backward-looking analyses are performed  
17 by accountants all the time, both for litigation and non-litigation purposes. Mr. Davis performed his  
18 analysis using generally accepted accounting methodologies, and his results are therefore reliable.<sup>10</sup>

19  
20 <sup>10</sup> The cases cited by Zuffa, DD at 11, are not to the contrary. In *Claar v. Burlington Northern Railroad*  
21 *Co.*, 29 F.3d 499 (9th Cir. 1994), the court excluded experts who “formed their opinions before reading  
22 the relevant literature, even though they admitted that they were not sufficiently familiar with the field  
23 to diagnose the causes of plaintiffs’ injuries without first reviewing that literature.” *Id.* at 502. *Claar*  
plainly has no application here. In *Barber v. United Airlines, Inc.*, 17 F. App’x 433, 437 (7th Cir. 2001),  
a negligence case involving an injury caused by turbulence, the excluded expert, Dr. Hynes,

24 relied on weather data, but he rejected some weather data that contradicted  
25 his opinion . . . rejected the testimony of the pilot and the copilot, which  
26 contradicted his opinion . . . did not give any additional data or information  
27 that he relied upon, which formed the basis of rejecting some of the  
28 weather data and the opinions of the copilots . . . [or] adequately explain  
why he ignored certain facts and data, while accepting others. Nor did Dr.  
Hynes present any other data which supported his opinion – he merely



**D. Mr. Davis’s Rebuttal Expert Report Is Proper**

Finally, Zuffa contends that Mr. Davis’s rebuttal is not proper rebuttal testimony. The Federal Rules of Civil Procedure provide for rebuttal testimony “intended solely to contradict or rebut evidence on the same subject matter identified by another party.” Fed. R. Civ. P. 26(a)(2)(D)(ii). Mr. Davis’s rebuttal does exactly that.

In her initial expert report, Elizabeth Davis opines [REDACTED]

[REDACTED] . EDR1 at 10-11, 23-29 (Opinions 3 & 4). [REDACTED]

---

accepted some of the testimony and weather data that suited his theory and ignored other portions of it that did not.

Here, conversely, Mr. Davis has not cherry-picked his data; he used all of Zuffa’s available financial information from 2005-2016. Zuffa quotes *Prescott Group Small Cap, L.P. v. Coleman Co.*, 2004 WL 2059515 (Del. Ch. Sept. 8, 2004), out of context. The full quote makes clear why the *Prescott* court’s holding is inapposite here:

Contemporary pre-merger management projections are particularly useful in the appraisal context because management projections, by definition, are not tainted by post-merger hindsight and are usually created by an impartial body. In stark contrast, *post hoc*, litigation-driven forecasts have an “untenably high” probability of containing “hindsight bias and other cognitive distortions.”

*Id.* at \*21, Zuffa’s selective quotation of *KRS Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), is similarly misleading. While the Court does note—as quoted by Zuffa—that “[a] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning,” it immediately goes on to state—as omitted by Zuffa—“[r]igid preventative rules that deny factfinders recourse to common sense, however, are neither necessary under our case law nor consistent with it.” *Id.* at 421. *InTouch Techs., Inc. v. VGO Communications, Inc.*, 751 F.3d 1327 (Fed. Cir. 2014), has no application here. In that patent case, the court rejected testimony from an expert whose opinion was directed to the wrong inquiry: what a person of ordinary skill in the art would understand in 2011, rather than 2001. *Id.* at 1352. Finally, *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000), is inapplicable here, because, as shown above, Zuffa has failed to show “deficiencies in the foundation” of Mr. Davis’s opinions.



1 [REDACTED] GDR2 at 22. Mr. Davis notes that [REDACTED]  
2 [REDACTED]  
3 [REDACTED]

4 *Id.* at 10 (Opinion 1). This  
5 testimony *directly rebuts* Ms. Davis's Opinions 3 & 4, and is therefore proper rebuttal.<sup>11</sup> Moreover, in  
6 light of Elizabeth Davis's Surrebuttal Report, served 30 days after Guy Davis's Rebuttal Report, Zuffa's  
7 contention that Mr. Davis's rebuttal opinions were not timely disclosed is not only groundless, but moot,  
8 as Zuffa has had a full and fair opportunity to respond. Having had the last word, Zuffa should not be  
heard to complain that Mr. Davis's rebuttal was not timely disclosed.

9 **V. CONCLUSION**

10 Zuffa offers no basis to exclude Opinions 1-4 and 6 of Guy Davis's initial report. As to Mr. Davis's  
11 opinions regarding Zuffa's capacity to increase fighter pay (as expressed in Opinion 5 of Mr. Davis's  
12 initial report and in his rebuttal), those opinions are relevant (as Zuffa opened the door); beyond the  
13 capacity of the average lay person; reliable; and, as to Mr. Davis's rebuttal report, contradict Zuffa's  
14 expert testimony. Zuffa's motion should therefore be denied.  
15  
16  
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23 <sup>11</sup> [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 Dated: April 6, 2018

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of April, 2018 a true and correct copy of  
**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT ZUFFA, LLC'S MOTION TO  
EXCLUDE THE TESTIMONY OF GUY A. DAVIS (ECF NO. 517)** was served via email on all  
parties or persons requiring notice.

/s/ Eric L. Cramer

Eric L. Cramer